

**Schwebel Baking Company, Inc. and Paul Edward Kuzma.** Case 8-CA-22322

January 22, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On July 9, 1991, Administrative Law Judge Leonard M. Wagman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's finding that the General Counsel established a prima facie case that employee Paul Edward Kuzma was discharged for his protected activity. We also agree with the judge that the Respondent demonstrated that it would have discharged Kuzma even in the absence of his protected activity, and it thereby established a complete defense, under *Wright Line*, 251 NLRB 1083 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to the allegation of unlawful discrimination.

In adopting the judge's recommendation that the complaint should be dismissed, we note that neither Kuzma's September 14, 1989 suspension nor his July 18, 1989 warning was alleged in the complaint to be unlawful, nor did the General Counsel otherwise give fair notice at trial that their lawfulness was under challenge.

*Steven Wilson, Esq.*, for the General Counsel.

*Frank W. Buck, Esq. (Duvin, Cahn & Barnard)*, of Cleveland, Ohio, for the Respondent.

*Staughton Lynd and Alice Lynd, Esqs. (Northeast Ohio Legal Services)*, of Youngstown, Ohio, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Youngstown, Ohio, on July 16 and 17, 1990. On a charge and an amended charge, filed by the Charging Party, Paul Edward Kuzma, on December 22,

1989,<sup>1</sup> and February 7, 1990, respectively, the Regional Director for Region 8, issued the complaint in this case, on March 29, 1990. The complaint alleged that the Respondent, Schwebel Baking Company, Inc. (the Company), had violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), by terminating Paul Edward Kuzma, the Charging Party (Kuzma). The Company, in its timely filed answer, denied that it had committed the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Kuzma, and the Company, respectively, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Company, an Ohio corporation, produces bread and other bakery products, at its Youngstown, Ohio facility, where it annually sells and ships products, goods, and materials valued in excess of \$50,000, directly to points located outside the State of Ohio. The complaint alleges, the answer admits, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

The complaint alleges, the answer admits, and I find that Bakers Union, Local No. 19 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

**III. ALLEGED UNFAIR LABOR PRACTICES**

*A. The Facts*

Of the Company's 1100 employees, 900 are covered by collective-bargaining agreements. The Company operates production facilities at Cuyahoga Falls, Solon, and Youngstown, Ohio. This case involves the Company's Youngstown plant, where the Union represents the production, maintenance, and sanitation employees under a 3-year collective-bargaining agreement, effective from July 1, 1987.

The Company employed Kuzma from May 5, 1985, until it terminated him on September 14. At the time of his termination, and for approximately 2 years preceding that date, Kuzma was a sanitation employee. At all times material to this case, Kuzma worked on the Youngstown plant's afternoon shift, under Supervisor Michael A. Cusick, whose immediate superior was Ray Cmil, the plant superintendent of sanitation. Cmil's immediate superior was Plant Manager Michael Polaske.

Article XV of the current collective-bargaining agreement covering the Youngstown plant, provides for employee and union grievances against the Company, and sets forth the procedure for their resolution. Kuzma frequently used that procedure for his complaints against the Company and Supervisor Cusick. He filed approximately 60 grievances during his employment by the Company. I find from Union Steward Rusty Hutch's testimony, that Kuzma stood out as a source of grievances.

<sup>1</sup> All dates are in 1989, unless otherwise indicated.

The record includes a sampling of the grievances, filed by Kuzma alone or by Kuzma together with other employees. The earliest of these grievances is dated November 29, 1987. The bulk of the grievances received in evidence bears 1989 dates.<sup>2</sup>

Approximately 3 weeks after Kuzma and three other employees had filed the grievance dated November 29, 1987, Superintendent Cmil cautioned Kuzma. I find from Kuzma's uncontroverted testimony that on that occasion, Cmil said that he would not tolerate Kuzma's "starting this grievance file" against the sanitation department. I also find from Kuzma's testimony that Cmil warned: "You're in the big leagues now. If you want to play hard ball, you ass hole, I'll fire you. It might take a while, but I will fire you."

Kuzma filed more grievances against Supervisor Cusick than did any of the other employees under Cusick. In some of these grievances, Kuzma complained that Cusick had performed work which, under article XI of the collective-bargaining agreement, was bargaining unit employees' work.<sup>3</sup>

At times, plant management expressed annoyance at Kuzma's article XI grievances. Thus, on April 25, 1988, after Kuzma joined with two other employees to file a grievance complaining about Cusick's performance of unit work, Cusick warned Kuzma that if he kept "playing with fire," he, Kuzma was "going to get burnt . . . ."<sup>4</sup>

Kuzma filed a grievance on February 10, seeking 45 minutes of overtime pay because Cusick performed bargaining unit work. In a written response to the Union, Polaske labeled Kuzma's contention as "completely unfair."

Shortly before taking his lunchbreak, on the evening of June 30, Kuzma noticed Cusick pushing a button to turn on a device referred to as a "proof box rack washer." On July 1, Kuzma filed a grievance complaining that Cusick's button pushing was work which should have been performed by a bargaining unit employee. On July 8, Plant Manager Polaske, in a letter to the Union, rejected this grievance on the ground that he did not consider pushing a button to be work.

In responding to another of Kuzma's article XI grievances filed in August against Cusick, Product Manager Dan Pannozzo denied it on the ground that Cusick was training a new employee. Pannozzo closed his letter, dated August 16, with the following comment:

Since the grievance did not come from the new employee but rather from Paul [Kuzma] who was not involved in the situation it appears that Paul is determined to instigate conflict between the company and the union.

In 1989, Cusick occasionally expressed hostility toward Kuzma's grievances. Early in the year, a union steward, Rusty Hutch provoked an outburst by stating in Cusick's presence that Kuzma intended to file "a couple more griev-

ances." Cusick remarked that "there was a man walking around with a target on his back."<sup>5</sup>

On February 10, Kuzma filed two grievances against Supervisor Cusick. One complained that Cusick had violated a safety code. The second grievance requested 45 minutes of premium pay on the ground that Cusick had performed work which should have been done by a bargaining unit employee.

Four days later, Cusick criticized Kuzma as the latter was ending his shift. Cusick noted that Kuzma had not completed certain assigned tasks. Kuzma attempted to explain. Cusick went on to criticize sharply the appearance of Kuzma's assigned area. Kuzma pointed out that he had done well on inspections. Cusick responded, saying he did not "like the fact that [Kuzma] was filing paper on [Cusick]." Continuing, Cusick warned that so long as Kuzma continued to file grievances, "occurrences like this are going to keep happening to you." Cusick concluded by suggesting that Kuzma retract the two grievances filed on February 10. Kuzma did not accede to this suggestion.

At the end of Kuzma's shift, as he was leaving, Cusick threatened him with discipline. Cusick warned that when Kuzma next returned to work, he would receive a writeup. On the following day, February 15, Kuzma arrived at work and received the threatened writeup. Kuzma filed a grievance, complaining that Cusick had disciplined him and was watching him closely in retaliation for his refusal to withdraw two grievances. At a grievance meeting on February 27, the Company agreed to withdraw the reprimand.<sup>6</sup>

On June 30, Cusick vented his anger during a conversation with employee Paul W. Peldon, at the plant. As the two were conversing, Kuzma approached them. I find from Peldon's uncontroverted testimony, that after Kuzma moved away, Cusick said: "I can't stand talking to that mother fucker for more than 2 minutes. He's nothing but a trouble maker."

On the evening of the same day, Supervisor Cusick had another opportunity to express his feelings about Kuzma. Shortly before he was to begin his lunch period, employee David Stupka asked Cusick where Kuzma was. I find from Stupka's uncontroverted testimony that Cusick replied: "Fuck Kuzma."

Kuzma also filed grievances complaining about the Company's implementation of the overtime and premium pay provisions of article III of the collective-bargaining agreement. On April 14, Kuzma filed a grievance regarding his workweek and premium pay for hours for which he had been regularly scheduled, and had been working, between midnight Friday and 2 a.m. on Saturday. In a written response to the Union, rejecting the grievance, Plant Manager Polaske showed annoyance when he closed with the following:

Paul has already received a direct answer to his concerns, yet since they are not to his liking, he chooses to continue unjust tactics thru grievance procedures, which I don't understand.

<sup>2</sup>The facts regarding the Company's bargaining relationship, Kuzma's employment history, and his grievance activity are undisputed.

<sup>3</sup>Art. XI of the collective bargaining agreement states:

No Superintendent, Assistant or Supervisory Employee shall be permitted to do any work regularly performed by members of the Union.

<sup>4</sup>I based my finding regarding Cusick's warning of April 25, 1988, on Kuzma's uncontroverted testimony.

<sup>5</sup>I based my findings regarding Cusick's remarks to Hutch on the latter's undisputed testimony.

<sup>6</sup>Cusick denied discussing grievances with Kuzma on February 14, or suggesting then that writeups would be withheld if Kuzma withheld grievances. However, as Kuzma seemed to be testifying about his dealings with Cusick on that occasion, in a forthright manner, and seemed to be conscientiously searching his memory, I have credited him and have rejected Cusick's denials.

Kuzma did not flinch. He filed a grievance on July 30, containing the following complaint:

The company uses 12:00 midnight Sunday as a cut off point for Sunday Premium Pay. I work 4:00 p.m. Sunday—12:30 a.m. Monday and do not get paid for the half hour worked into Monday. Why in the same respect, is midnight Friday not recognized as a cut off point for our work week? This is a double standard and we should be paid for one or the other. Which one?

The Company rejected this grievance in a letter to the Union, dated August 16.

I find from Kuzma's uncontradicted testimony, that at about the time he filed the grievance of July 30, he and six of his fellow sanitation employees, at various times, discussed the Company's policy of requiring them to work into the early hours of their days off and their possible entitlement under the contract, or under state or Federal law, to some extra compensation for working those hours. Kuzma's testimony shows that he participated in such discussions at various places in the Company's Youngstown plant, before his shift began, during worktime, and in the washroom, toward the shift's end.

Not content with the Company's treatment of the grievance he had filed on April 14, Kuzma sought arbitration. On September 1, union and company representatives met to discuss Kuzma's demand. The record did not disclose the outcome of that parley.

Early in September, Kuzma and fellow employee David Stupka visited the Youngstown office of the U. S. Department of Labor's wage and hour division to obtain information regarding overtime. Approximately 2 days after this visit, Stupka told Supervisor Kusick of this visit.<sup>7</sup> Stupka reported that he and Kuzma had visited the wage and hour office, and had obtained information showing that the sanitation employees, who worked from 1 week into the next, were entitled to backpay. Kusick replied in substance that the resolution of this dispute was not his responsibility.

Kuzma first provoked the Company to discharge him, toward the end of his afternoon shift, shortly before 1 a.m., on July 1. Shortly before midnight on June 30, Kuzma and Cusick became embroiled in a work-related argument. In the course of the exchange, Kuzma raised his voice, refused to comply with Cusick's instruction that he remove a screen and take it to plant maintenance. Kuzma also complained that Cusick and Superintendent Cmil were assigning excessive work to him. Cusick threatened to send Kuzma home, if he continued to raise his voice. Kuzma dared Cusick to carry out his threat. Cusick immediately suspended Kuzma, pending termination. However, by the time Kuzma left the plant, Cmil had converted the suspension to a termination, and told Kuzma he was terminated.<sup>8</sup>

<sup>7</sup> Cusick denied knowledge of Kuzma's visits to the wage and hour division's office. However, as Stupka impressed me as being more forthright in his manner, as he searched his recollection, I have credited testimony showing that Cusick obtained such knowledge from him in early September.

<sup>8</sup> In testifying about his confrontation of July 1 with Cusick, Kuzma's growing enthusiasm as he attributed obscene language to Cusick suggested that he was tailoring his testimony to help the General Counsel's case. In contrast, Cusick gave a detailed account

Kuzma filed a grievance seeking reinstatement. Following a hearing on July 14, the Company agreed to reduce his termination to a disciplinary suspension, and to reinstate Kuzma on July 19, without backpay. However, the Company reinstated Kuzma, with the understanding that if he were again insubordinate, he would suffer "further disciplinary action up to termination." In a letter dated July 18, Plant Manager Polaske announced the Company's decision to the Union. Soon after his reinstatement, Kuzma read Polaske's letter.

On February 7, 1990, Kuzma filed an amended unfair labor practice charge in this case, alleging, inter alia, that the Company violated Section 8(a)(3) and (1) of the Act on July 1, by terminating him. On March 30, 1990, the Regional Director for Region 8 dismissed that allegation in light of the resolution of the grievance arising out of that termination.

On September 10, Cusick held a safety meeting with the bargaining unit employees under his supervision, including Kuzma. Included in the topics chosen by Cusick for discussion, was the Company's policy on breaks. Company management had advised Cusick that his employees had been away from their assigned work areas during working hours. Cusick told the assembled employees that they were to adhere strictly to the 15-minute break limit. He also reminded them that they were not to be walking around or loitering.

The company policy to which Cusick referred in his remarks on September 10, appears in its employee handbook. A paragraph entitled "Breaks and Lunches" recites the number and duration of break and lunch periods, and points out that each department sets its own break and lunch periods. The handbook states that, in general, two 10-minute rest breaks are authorized for most employees during a scheduled shift, and that other departments allow two 15-minute breaks. The employee handbook also lists work rules and disciplinary policy. Among the offenses listed as serious enough to subject an employee to discharge on the first violation, is "overstaying breaks." I find from employee Melvin Copeland's uncontradicted testimony, that management reminded sanitation department employees of the 15-minute limit on breaks, approximately once every 3 months.

Accompanied by employee Steve Soulick, Kuzma went to the wage and hour division's Youngstown office on the morning of September 13. Kuzma obtained some written material from that office, which he took to work, later that day. Before the afternoon shift began, Kuzma showed the material to his colleagues in the plant locker room. In the course of the resulting discussion of the overtime issue, Kuzick walked past the conversing employees.<sup>9</sup>

At about 8 p.m., on September 14, Cusick approached Kuzma at the plant and suggested that he stop telling employees that the Company was required to pay employees time-and-a-half for hours worked "between work weeks." Cusick reminded Kuzma that the sanitation department did not pay overtime, and predicted that it would not in the fu-

of this incident in a calm manner, and seemed to be providing his full recollection without embellishment. Therefore, I have credited Cusick's version of the incident leading up to Kuzma's termination on July 1.

<sup>9</sup> Kuzma's credible and uncontradicted testimony was the source of my findings regarding his visit to the wage and hour division's office, on the morning of September 13, his activity at the Company's plant, later that day, with the material he had obtained from that office, and Cusick's presence near one of the discussions.

ture. Kuzma replied, in substance, that when the Company changed its policy and decided to comply with the collective-bargaining agreement and wage and hour laws, it would pay overtime. Cusick walked away without further comment.<sup>10</sup>

At approximately 10:15 p.m., that same day, Kuzma stopped washing the wall next to the bread oven area, where Cusick had assigned him to work that evening, and went to a washroom to rinse out some rags he had used on the wall. When he arrived, he found employee Terrance Escarco in the washroom. After approximately 5 minutes, Kuzma finished washing his rags and returned to the bread oven area. After putting the rags into a bucket of water, Kuzma detected the strong odor of a degreaser in the rags and on his hands. He walked to a sink in the vicinity of three bun mixers to wash the substance off of his hands.<sup>11</sup>

I find from Cusick's testimony that he stood in an adjacent area, watching Kuzma wash up, saw that it was approximately 10:15 p.m., and, based on what he knew of Kuzma's habits, assumed that Kuzma was about to take a break. Cusick began to monitor Kuzma's break "because he was out of his job area, observed washing his hands at that particular sink behind No. 3 mixer."

It is undisputed, that as Kuzma washed his hands, employee William B. Luther waved to him from the bun proof area. I also find from Kuzma's and Luther's testimony, that after finishing at the sink, Kuzma helped Luther carry a ladder and some equipment from a proof box to the bread make up area. Their credited testimony also shows that by the time Kuzma and Luther had disposed of the ladder and the equipment, the time was 10:30 p.m., breaktime. I find from their testimony, that Luther and Kuzma proceeded to the plant lunchroom. Further, I find from Kuzma's testimony, that he remained in the breakroom close to 15 minutes, and then returned to the wall, near the bread oven.

At about 10:35 p.m., when it appeared that Kuzma had overstayed his break, Bread Production Superintendent William Hunter, in whose office Cusick was waiting, suggested that Cusick obtain a disciplinary form, a corrective action notice. Cusick followed Hunter's advice, and began to fill the form out. Cusick wrote that he had observed Kuzma washing at the sink in back of the No. 3 mixer "at approximately 10:15 p.m." and added "returned at—." Cusick waited to fill in the time of return. Hunter saw Kuzma return and imme-

<sup>10</sup> I based my findings regarding Cusick's and Kuzma's exchange of remarks regarding overtime, on the evening of September 14, on the latter's testimony. Cusick did not clearly deny the remarks attributed to him by Kuzma. Instead, when asked if he had conversation with Kuzma about overtime and workweeks on September 14, or at any other time, Cusick testified:

No, not to, my knowledge. I don't remember saying anything about overtime, or paying overtime, or working overtime.

Cusick's detailed testimony about the subsequent confrontations involving him and Kuzma on the evening of September 14, suggests that Cusick should also have remembered whether or not he discussed overtime with Kuzma on that same evening. Against this backdrop, Cusick's failure to deny flatly that he had such a discussion, suggested that perhaps it did occur. This factor, and Kuzma's matter-of-fact tone, as he recounted the exchange, persuaded me to credit his testimony regarding Cusick's remarks to him on the evening of September 14.

<sup>11</sup> I based my findings regarding the washing of rags and Kuzma's hands on the evening of September 14, on his uncontradicted testimony.

diately pointed him out to Cusick, who saw that it was 10:47 p.m., and filled in the disciplinary form accordingly.

Hunter went to Kuzma and conducted him to the bread production office, where Cusick was waiting with the disciplinary writeup. When Kuzma arrived in the bread production office, Cusick picked up the completed disciplinary form, asserted that Kuzma had taken a 32-minute break, beginning at 10:15 p.m. and ending at 10:47 p.m., and announced his suspension pending investigation.

Kuzma interrupted Cusick, saying "that's bullshit, I'm not going to rebut this. I'll punch out and leave." Kuzma then left the office, slamming the door as he went.

Under Hunter's instructions, Cusick followed, to make sure that Kuzma left the plant and turned in his I.D. card. Cusick came within 3 to 5 paces behind Kuzma. Kuzma soon noted Cusick and warned him that "some day it's just going to be you and me." When they reached the timeclock, Cusick suggested that Kuzma retrieve whatever personal items he might have left in his locker. Kuzma turned and rebuffed Cusick, saying: "I don't even want to talk to you, just get off of me. And you can wipe that smirk look off your face."

Cusick asked Kuzma to hand over his I.D. card. Whereupon, Kuzma pulled the card out of his wallet and offered it to Cusick, saying: You can have my fucking I.D.. Cusick accepted the card, stepped back, and said, "thank you." In the course of turning his I.D. card over, Kuzma called Cusick a "mother fucker." As Cusick began to walk toward the production area, Kuzma remarked: "[Y]eah, you got my fucking I.D. card. I hope—you can cram it, and I hope you choke on it." Kuzma added: "[Y]ou know, someday you'll get yours. I guarantee it, asshole." Cusick turned to see if Kuzma was leaving, but made no comment. Kuzma looked at Cusick and said, "[Y]eah, I thought that'd get your attention." Kuzma left the plant.<sup>12</sup>

The remaining facts are not in dispute. When he returned to the bread production office, Cusick reported Kuzma's conduct to Production Superintendent Hunter, who instructed him to write down the details "while it's still fresh in your memory." Cusick followed Hunter's instructions, and notified Sanitation Superintendent Cmil, who asked for all the documentation of the incident. Later in the morning of September 15, Cusick reported Kuzma's conduct to Plant Manager Michael Polaske.

That same day, and on the following day, Saturday, Polaske telephoned Kuzma's home to investigate Cusick's report. Polaske did not reach Kuzma. However, on Saturday, Polaske left a message with Kuzma's wife to return

<sup>12</sup> I based my findings regarding Cusick's perception that Kuzma had been on a 32-minute break, and the subsequent confrontations between him and Kuzma, on Cusick's testimony and the contents of Polaske's letter of September 18 to Kuzma. Cusick testified about those matters with consistency and in a frank manner. In contrast, Kuzma was at times evasive on cross-examination about his conduct on the night of September 14. Further, his testimony regarding that topic contained material inconsistencies. These infirmities in Kuzma's testimony, and his apparent anxiety as he responded to cross-examination, suggested that he was not a candid witness regarding what occurred during his encounters with Cusick, on the night of September 14. Thus, of the two, Cusick impressed me as being the more reliable witness regarding their encounters on that night.

Polaske's call. Kuzma attempted unsuccessfully to telephone Polaske, later, on Saturday. Thereafter, neither Polaske nor Kuzma attempted to communicate with one another.

On Monday, September 18, relying on Cusick's report, Polaske decided to terminate Kuzma. On the same day, Polaske sent a letter to Kuzma announcing this decision and giving an explanation as follows:

On September 14, 1989 at 10:47 p.m. you were observed returning 17 minutes late from your scheduled 15 minute relief break.

When this was discovered, you were suspended pending investigation. At that point altercations ensued, in which you engaged in insubordination and threats to your supervisor.

I have investigated this matter fully with Company Personnel. The investigation revealed you overstayed your break by at least 17 minutes. When appropriate disciplinary action was initiated concerning this violation, you refused to give any explanation of the offence. and [sic] instead you were grossly insubordinate in directing threats and personally abusive profanity [sic] at your supervisor.

You have been previously warned about such behavior in the past, when you were advised that such behavior could result in termination.

I have determined from this investigation the suspension pending investigation must be converted to termination.

The Company has not offered reinstatement to Kuzma.

#### B. Analysis and Conclusions

The General Counsel contends that the Company terminated Kuzma on September 18 in retaliation for his effort to press for more overtime wages and for the numerous grievances he filed under the collective-bargaining agreement, and thereby violated Section 8(a)(3) and (1) of the Act. The Company urges rejection of that contention on the ground that the record does not show that Kuzma's grievances had anything to do with his termination. Instead, the Company raises Kuzma's insubordination toward Supervisor Cusick on the night of September 14, as the reason for termination. For the reasons set forth below, I find that the General Counsel has not shown by a preponderance of the evidence that Kuzma's grievances or any other activity protected by Section 7 of the Act<sup>13</sup> played any role in the Company's decision to terminate him on September 18.

Under Board policy, where the record shows that an employer's hostility toward union activity, or other activity protected by Section 7 of the Act, was a motivating factor in a decision to discharge an employee, the discharge will be found to be unlawful, unless the employer demonstrates, as an affirmative defense, that it would have discharged the employee even in the absence of the protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402–

403 (1983), affg. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Where it is shown that the business reason or reasons advanced by the employer for the discharge were pretextual—that is, that the reason or reasons either do not exist or were not in fact relied upon—it necessarily follows that the employer has not met its burden and the inquiry is logically at an end. *Wright Line*, 251 NLRB at 1084.

It is undisputed that well before September 14, Cusick, Hunter, Cmil, and Polaske were aware of Kuzma's resort to grievances to allege violations of the collective-bargaining agreement and of his efforts to obtain overtime wages for himself and his fellow sanitation employees. Further, Cusick was aware that he was a primary target of many of those grievances. Kuzma's efforts to vindicate the collective-bargaining agreement constituted concerted activity protected by Section 7 of the Act. *NLRB v. Ford Motor Co.*, 683 F.2d 156, 158 (6th Cir. 1982). Section 7 of the Act also protected Kuzma's attempt to resolve the issue of overtime in association with fellow employees. *Nu Dawn Homes*, 289 NLRB 554, 558 (1988).

The record shows that the company management at its Youngstown facility was vexed by Kuzma's grievances. As early as November 29, 1987, well beyond the 6-month limitation period imposed by Section 10(b) of the Act, Superintendent Cmil threatened discharge if Kuzma insisted on starting a grievance filed against the sanitation department. In April 1988, Supervisor Cusick warned Kuzma that if he kept "playing with fire," he was "going to get burnt."

In 1989, beyond the statutory 6-month limitation period, Cusick continued to threaten reprisals for Kuzma's grievances. Thus, early in the year, in conversation with Union Steward Hutch, Cusick implied that Kuzma was jeopardizing his employment by filing more grievances. On February 14, Cusick warned Kuzma that if he continued to file grievances, he would suffer Cusick's sharp criticism of his work performance. Cusick suggested that Kuzma withdraw two grievances, which he had filed on February 10. When Kuzma rejected this suggestion, Cusick threatened discipline.

On February 15, Cusick issued a reprimand to Kuzma. In response to Kuzma's subsequent grievance, complaining that Cusick had issued the writeup in retaliation for Kuzma's refusal to withdraw two grievances, the Company withdrew the reprimand.

In their responses to Kuzma's grievances, in 1989, Plant Manager Polaske and Product Manager Pannozzo reflected irritation at him. However, neither of them threatened Kuzma with any reprisal.

In sum, the record leaves little doubt that by the evening of September 14, Cusick's hostility toward Kuzma had reached considerable dimension. Given Cusick's state of mind, his futile attempt at 8 p.m. that day to discourage Kuzma from seeking overtime for the sanitation department employees, was likely to provoke a desire to rid the plant of an annoyance.

Cusick's attitude toward Kuzma, and the timing of Cusick's decision to suspend Kuzma, less than 3 hours after the two had clashed over the overtime issue, suggested a connection between the two events. On its face, the Company's neglect to investigate Cusick's allegation that Kuzma had taken an excessive break, suggested that it was anxious

<sup>13</sup> Sec. 7 of the Act provides, in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

to find a reason to get rid of the leading grievance at its Youngstown plant. Then, when Kuzma lost his composure and vented his wrath on Cusick shortly after their confrontation over the suspension, the Company lost interest in the alleged excessive break, and discharged Kuzma for insubordination. This change in focus suggested that the Company thought the apparent excessive break was not a convincing reason for discharging Kuzma. Thus, I find that there was a *prima facie* showing that Kuzma's grievances and his effort to agitate his fellow employees to seek overtime pay from the Company were factors in Plant Manager Polaske's decision on September 18, to discharge Kuzma.

Plant Manager Polaske testified that he terminated Kuzma for insubordination to Cusick. I find that the Company has shown that Polaske would have made the same decision even if Kuzma had not been a frequent grievant and had not been agitating and encouraging other employees to press for overtime pay.

On July 1, the Company terminated Kuzma for insubordination. Kuzma filed an amended unfair labor practice charge in the instant case, alleging that the Company thereby unlawfully discriminated against him. However, the Company reduced the discharge to a disciplinary suspension, accompanied by a warning that if he were again insubordinate, Kuzma would be subject to "further disciplinary action up to termination." In the face of Company's change of heart, the Regional Director dismissed that allegation. The General Counsel has not alleged that the suspension and accompanying warning violated the Act.

Kuzma ignored the Company's warning. On September 14, while he was suspended pending investigation for taking excessive breaktime, Kuzma launched into a verbal assault on his immediate supervisor, Cusick. Kuzma insulted Cusick, with obscenities, and twice hinted that Cusick would suffer physical abuse at Kuzma's hands. By the following day, Plant Manager Polaske had Cusick's account of Kuzma's insubordinate conduct. Polaske attempted to reach Kuzma by phone. Polaske left word with Kuzma's wife on Saturday, requesting Kuzma to return his call. On Monday afternoon, September 18, when he had not heard from Kuzma, Polaske, mindful of the warning he had given to Kuzma in July, decided to discharge him, and sent a letter announcing Kuzma's discharge and explaining the decision.

Counsel for the General Counsel argues that the suspension pending investigation, which Cusick imposed on Kuzma, was unjust and thus excused the latter's misconduct, and evidenced the Company's unlawful motive. According to counsel for the General Counsel, Kuzma did not overstay his break on the evening of September 14, and Cusick should have investigated to find out if in fact Kuzma had been on a 32-minute break, before suspending him. I find no merit in this argument.

At the outset, I note the absence of any allegation in the complaint that the suspension, which Cusick imposed on Kuzma on September 14, violated the Act. Nor do I find sufficient evidence to support a finding that the suspension was unlawful.

Four days before this incident, Cusick had warned Kuzma and other sanitation employees to adhere strictly to the 15-minute limit to their breaks. There was no allegation that this warning violated the Act. Thus, the record showed that on the evening of September 14, Cusick was genuinely concerned about enforcement of the 15-minute limit.

Also, contrary to the General Counsel's position, Cusick had ample ground for his belief that Kuzma had been on a 32-minute break. Thus, I find from Cusick's undisputed testimony, that he had observed Kuzma's work habits sufficiently to infer on the evening of September 14, that Kuzma had been on such a break. I also find that on the evening of September 14, Kuzma's response to Cusick's accusation was not a denial. Instead, Kuzma was defiant, saying "that's bullshit, I'm not going to rebut this. I'll punch out and leave." Absent from Kuzma's outburst was any assertion that he had observed the 15-minute break limit, and that he had witnesses to prove that he had. Kuzma did not say anything which would have alerted Cusick to the need for an investigation of the apparent violation of a company rule. Cusick, with good cause, remained secure in his belief that he had witnessed a violation of the Company's 15-minute limit on sanitation department breaks.

In sum, on receiving Cusick's report, and after waiting until the afternoon of September 18, Polaske had a valid ground for terminating Kuzma. By his letter of July 18, Polaske had warned Kuzma of termination if he again was insubordinate toward his immediate supervisor. Polaske recalled the warning of July 18, reasonably saw Kuzma's conduct toward Cusick on the evening of September 14, as a repetition of the conduct which had provoked Kuzma's termination on July 1, and carried out the warning. There was no showing that Polaske had ever relented in a similar situation. Indeed, there was no showing that a similar situation had ever confronted Polaske. However, in light of Polaske's warning in his letter of July 18, I have no doubt that Polaske would have terminated Kuzma for the second infraction even if that employee had not been engaged in activity protected by Section 7 of the Act.

Thus, even if the Company's management at the Youngstown plant were glad to be rid of a prime source of grievances and agitation regarding overtime, I cannot find that Kuzma's Section 7 activity was a motivating factor in the Company's decision to discharge Kuzma. Accordingly, I find that the General Counsel has not shown by a preponderance of the evidence that the Company violated the Act, when it discharged Kuzma on September 18. I shall, therefore, recommend dismissal of the complaint.

#### CONCLUSIONS OF LAW

1. Schwebel Baking Company, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Baker's Union, Local No. 19 is, and, at all times material to this case has been, a labor organization within the meaning of Section 2(5) of the Act.

3. Schwebel Baking Company, Inc., has not committed any of the unfair labor practices alleged in this complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

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<sup>14</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

#### ORDER

The complaint is dismissed.

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ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.